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IN THE SUPREME COURT OF THE STATE OF IDAHO

RYAN CONNER and JAMI LEIGH
STEINMEYER-CONNER,

Plaintiffs/Appellants,

vs.

BRYAN F. HODGES, M.D. individually, and
JOHN DOES I-V, persons or entities

Defendants/Respondents.

DOCKET NO. 40742

APPELLANT RYAN CONNER'S REPLY BRIEF

Appeal from the District Court of the
Fourth Judicial District of Ada County

Honorable Ronald J. Wilper
District Judge, Presiding

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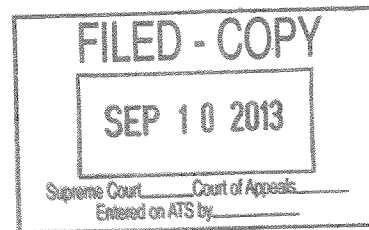


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I. INTRODUCTION

This brief responds to Respondent's arguments beginning at p. 35 of his Respondent's Brief. Mr. Conner has freely admitted that his loss of consortium claim is a wholly derivative cause of action. It is contingent upon his spouse's success. Accordingly, Mr. Conner will again not respond to any of the arguments directed towards his spouse, Jami Steinmeyer-Conner, but, instead, incorporates all of her arguments herein by reference.

The following sections of this Reply Brief will follow in the same order as the Respondent's Brief beginning at p. 35.

II. ARGUMENT

E. Lack of Spousal Relationship.

Dr. Hodges apparently continues to argue that Jami is the "property" of Ryan or, more generally, that consortium is a sort of property interest like the loss of a cow or a sheep. This follows from Dr. Hodges' citation to *Riggs v. Smith*, 52 Idaho 43, 48, 11 P.2d 358, 360 (1932) (stating consortium "is a property right growing out of the marriage relation, for loss of which recovery may be had, and includes the exclusive right to the services of the spouse . . . and also the exclusive right to the society, companionship and conjugal affection towards each other.")

In the first instance, Idaho women in 2013 would predictably bristle if anyone would declare them to be the "property" of their husband. While women may have been

property of their husbands at some long-forgotten point in time, just as slaves were the property of their masters prior to the Civil War, social mores have changed considerably, especially in the last fifty years.

The 50th anniversary of Dr. King's "I Have a Dream" speech recently brought home the fact that a black man could not share a seat with a white man (or woman) on a bus just a short time ago. Similarly, persons of different races could not live together as man and wife in, *e.g.*, Maryland or Virginia in 1965. The concept of social and societal changes was amply argued in Ryan's Opening Brief. These changes have resulted in a plethora of cases at all state and federal levels.

Riggs v. Smith, supra, was decided in 1932. Back then in the 30's there was a huge outcry when Rhett Butler stated on the silver screen: "Frankly my dear, I don't give a damn." Any woman wearing a 2013 bikini bathing suit would have been arrested and locked up. And Jim Crow was not only alive and well – segregation was judicially approved. The point is that a 1932 decision of this Court which did not specifically hold that a claim for a loss of consortium could only be brought if a man was married to an injured spouse is not in any sense immutable bedrock upon which Dr. Hodges can stand.

Further, it is not questioned by Dr. Hodges that Ryan and Jami are husband and wife. If loss of consortium is based upon and requires a marriage relationship as argued by Dr. Hodges, there is a marriage relationship. Whether Ryan was in that relationship with Jami at the time of the surgery does not seem particularly relevant. This goes back to the argument of foreseeability which, as previously argued and not even responded to by Dr. Hodges, is a question for the jury. It is simply a *non-sequitur* and a boot-strapping argument to say that "Mr. Conner cannot claim loss of consortium arising from a surgery

performed in January of 2007 because he and Jami were not married at the time of Dr. Hodges negligent surgery.

G. Dr. Hodges did owe a duty to Mr. Conner.

Dr. Hodges' Respondent's Brief states that Mr. Conner has failed to raise, or cite any law to support the issue of Dr. Hodges owing him a duty. In the context of a claim for a loss of consortium, Dr. Hodges' argument is without merit.

If Ryan's cause of action is a derivative cause of action and if a duty is owed to Jami, then it follows, perforce, that a duty is owed to Mr. Conner. This also touches on the issue of foreseeability as previously briefed. Ample law was cited in Jami's Appellant's Brief and in Ryan's Appellant's Brief to support the idea that it was foreseeable to Dr. Hodges that if he did not proceed carefully with the tubal ligation, not only could Jami be injured but a male partner who unintentionally and unwittingly fathered a child with Jami would also be affected.

Ryan has no quarrel with Dr. Hodges' recitation of the four pillars of common law negligence in this state. As previously argued, Dr. Hodges had a duty to proceed carefully with the tubal ligation, he breached the duty, this established a causal connection between his conduct and the injury to Jami (and the corresponding injury to Ryan), and the actual loss or damage which both Ryan and Jami have testified to in their depositions. Yes, there was no physician-patient relationship between Dr. Hodges and Ryan Conner in the strict sense. But, again, that would not seem to be required if one follows the concept of a derivative cause of action. If Driver A drives his automobile

negligently and strikes Mrs. B's automobile killing her, Mrs. B's husband who is miles away at work can nevertheless allege a loss of consortium. He was nowhere in sight at the time of the accident. He was not in any zone of danger. He was a complete stranger to A at the time of the negligent act. Driver A did not even know that Mrs. B was married. But since Mrs. B's husband does have a derivative cause of action and since there was a duty owed by Driver A to Mrs. B, the widower is eligible to receive a recovery for his loss of consortium if A was negligent. Since it is very clear that Dr. Hodges owed a duty to Jami (his patient), then the question becomes whether, in a wholly derivative cause of action, that duty extends to the unknown and future spouse. Ryan has argued responsibly and cogently that the duty does extend to him through Jami, his spouse.

As for the argument that Ryan has stated no argument on negligence, Ryan has stated that his is a derivative cause of action and that his claim will rise and fall on the success or lack thereof of Jami's appeal. Ryan stated explicitly at p. 1 of his Appellant's Brief that "Jami's arguments on the merits of her case will support the derivative claims for loss of consortium." Clearly, this Court does not need redundant briefing. And, just as clearly, Ryan's recitation of the facts at pps. 2-4 of that same Appellant's Brief leave no doubt that Dr. Hodges' procedure was negligently performed.

H. Attorney's fees on appeal.

Dr. Hodges has requested that he be awarded his attorney's fees and costs on appeal. He specifically rests his claim on I.C. § 12-121 arguing that the appeal has been

brought frivolously, unreasonably or without foundation. That position seems unnecessarily harsh and misplaced.

It is always an honor to represent clients before this Court. The undersigned has done so approximately fifty-five times over the course of forty-two years. Ryan's claim, while unusual, and, indeed, without precedent in this state, proceeds upon logic and in accordance with Idaho law concerning foreseeability. Even if Ryan's arguments are unsuccessful, it is submitted that they nevertheless reflect a good faith effort to extend the law and refine what can be legitimately argued as a species of archaic law stemming from husbands' property rights with respect to their wives who were considered at common law to be legally little more than the cattle or sheep a husband owned. To limit a loss of consortium only to a spouse who is a spouse at the instant of the tort is questionable and has been questioned here.

In other words, if John is engaged to be wed to Jane and the day before the wedding Jane is run over by a Greyhound bus and is rendered paraplegic but John marries her notwithstanding that horrible injury, can equity or law support the idea that if the injury occurred 24 hours later John would have a remedy for loss of consortium but, since he was not actually married to Jane at the time of the injury, he has no cause of action to compensate him for what he will go through for the entire course of their married life in taking care of Jane? This example is simply a way of saying that there seems to be neither rhyme nor reason to say that the injury must occur during the course of a marriage. Perhaps Ryan's loss of consortium claim would not commence until he married Jami. That would nevertheless seem to be an improvement upon the present

state of things where Dr. Hodges argues there is absolutely no remedy and no foreseeability.

Ryan maintains that the quality of the relationship between him and Jami should govern and that is a jury question. To so assert is not to engage in frivolity and reason can support the position Ryan asserts.

III. CONCLUSION

Based upon the foregoing arguments, Ryan respectfully requests a reversal of the Trial Court's decision and a remand for further proceedings.

RESPECTFULLY SUBMITTED this 10th day of September, 2013.

LOJEK LAW OFFICES, CHTD.



By: Donald W. Lojek – Of the Firm
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of September, 2013, a true and correct copy of the foregoing instrument was served on the following by the method indicated below, and addressed as follows:

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